No. 14-232

In The
Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT
REDISTRICTING COMMISSION, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Arizona

BRIEF OF *AMICI CURIAE* THE NAVAJO NATION AND LEONARD GORMAN IN SUPPORT OF APPELLEES [IMPACT ON ARIZONA AMERICAN INDIANS]

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus Navajo Nation is a federally recognized Indian tribe and is the largest Indian nation in the United States, comprising over 300,000 members and occupying approximately 25,000 square miles of trust lands within Arizona, New Mexico, and Utah.[2] The Navajo Nation participated in nearly all of the public meetings surrounding the development of the challenged legislative map and strongly advocated for maintaining a robust Native American majority-minority district. The Navajo Nation has been involved in a number of voting rights lawsuits to ensure that its members can participate in the electoral process.

Amicus Leonard Gorman is an enrolled member of the Navajo Nation, a qualified elector in Arizona and a resident of Window Rock, Arizona, in Apache County. Mr. Gorman is the Executive Director of the

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[1] Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or part, and no persons or entity, other than *Amici Curiae* and their counsel, made a financial contribution for the preparation or submission of this brief.

[2] According to the 2010 Census, approximately 173,000 individuals live on the Navajo Reservation, approximately 97% of whom are American Indian. U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, Table 6 (2012), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

Navajo Nation Human Rights Commission. The Commission is charged with protecting and promoting the human rights of Navajo citizens by advocating human equality at the local, state, national and international levels. As part of this mission, the Commission is focused on ensuring that Navajo citizens are able to vote and to elect candidates of their choice. He has participated most recently in Congressional and legislative redistricting for the states of Arizona, New Mexico and Utah. He provided Navajo-sponsored plans for the American Indian majority-minority legislative district in Arizona and testified concerning redistricting before the Arizona Independent Redistricting Commission. Mr. Gorman was a plaintiff in *Navajo Nation v. Brewer*, CV-06-1575-PHX-ROS (D. Ariz. filed June 20, 2006) challenging Arizona's voter identification law.

The Navajo Nation and Leonard Gorman participated as *Amici Curiae* in the case below. *Amici* file this brief on behalf of Navajo citizens, whose right to vote was only recently realized, to demonstrate that the Native American majority-minority legislative district on the Arizona portion of the Navajo Reservation was not drawn for partisan advantage. Further, *Amici* file this brief in support of the right to vote of American Indians, including elders and others who live traditional lifestyles in rural and remote areas where they continue to speak traditional American Indian languages and face the impacts of past discrimination in the areas of health, education, and voting.

SUMMARY OF THE ARGUMENT

Amici agree with Appellee Independent Redistricting Commission ("Commission") that the population deviations in Arizona's 2012 legislative map ("Legislative Plan") are permissible under this Court's jurisprudence and that *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) is not applicable here. Moreover, *Amici* are concerned that if the Court grants relief that the framework for legislative redistricting will change, negatively impacting many Indian voters who only recently secured the right to vote.

ARGUMENT

Appellants' challenge is precisely the type that Justice Scalia warned against – a challenge to a legislative plan based on allegations that minute population deviations resulted from political motives. In his dissent in *Cox v. Larios*'s summary affirmance, Justice Scalia stated that it is not obvious that minor population deviations – within ten percent – go too far.

> To say that it does is to invite allegations of political motivation whenever there is population disparity, and thus to destroy the 10% safe harbor our cases provide. Ferretting out political motives in minute population deviations seems to me more likely to encourage politically motivated litigation than to vindicate political rights.

Cox v. Larios, 542 U.S. 947, 952 (2004). The challenge to the Legislative Plan ignores the requests by thousands of citizens, including those of the Navajo Nation, to create legislative districts that meet not only the neutral state redistricting criteria, but also the limitations set forth by federal law.

Appellants claim that the Legislative Plan was created solely for partisan purposes. Jt. App. 101a.[3] The lower court found that the record reflects legitimate policy reasons for developing the Legislative Plan. This Court should affirm under its prior precedent that minor population deviations are presumptively valid, and that Appellants failed to meet its burden to prove otherwise. This Court should not be persuaded by the conjecture and conspiracy theories that the Commission's sole purpose was to draw a Legislative plan that favored Democrats. This allegation ignores the wishes of the Arizona citizens who participated in good faith and provided testimony to the Commission based on Arizona's constitutional redistricting provisions.

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[3] "J.S. App." refers to the Appendix to the Jurisdictional Statement; "Supp. App." refers to Supplemental Appendix to Motion to Dismiss; "Jt. App." refers to the Joint Appendix; and "S.J.A." refers to the Supplemental Joint Appendix.

I. Arizona's Legislative Plan Is Constitutional.

A. Arizona's Legislative Plan Is Presumptively Valid.

Redistricting is "primarily the duty and responsibility of the State." *Perry v. Perez*, 132 S. Ct. 934, 940 (2012) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). The Legislative Plan has a maximum deviation from the ideal population of 8.8 percent. S.J.A. at 46 (The Legislative Districts "range between 203,026 (4.7% below the ideal population) to 221,735 (4.1% above the ideal population)"). When, as in the instant matter, the maximum deviation is less than ten percent, the apportionment plan is presumptively valid. *E.g.*, *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993).

> [M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State.

Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (internal quotation marks and citations omitted).

Since the deviation is less than ten percent, the Legislative Plan is presumptively valid.

This Court adopted a ten percent standard for deviations in state legislative redistricting. *Brown*, 462 U.S. at 842 (an apportionment plan with a deviation less than 10% is presumptively constitutional); *Gaffney v. Cummings*, 412 U.S. 735, 751-52 (1973) (maximum deviation of 8% does not establish a prima facie case of discrimination); *White v. Regester*, 412 U.S. 755, 763 (1973) (deviation of 9.9% does not establish a prima facie case of discrimination). In *Gaffney*, the Court stated that "minor deviations from mathematical equality among state legislative districts do not make out a prima facie case of invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment so as to require justification by the State." 412 U.S. at 745. The deviation must be higher than ten percent to create a prima facie case of discrimination. *Brown*, 462 U.S. at 842-43.

The 2001 Arizona Independent Redistricting Commission's proposed legislative redistricting plan ranged from -4.080% to +4.95%, for a total acceptable deviation of 9.03%. *Navajo Nation v. Arizona Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998, 1009 (D. Ariz. 2002); *see Jeffers v. Clinton*, 756 F. Supp. 1195, 1201 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991) (10.9% total deviation, with one district overpopulated by 5.8% and one district underpopulated by 5.1%, was acceptable deviation). Here, the maximum

population deviation is 8.8% and presumptively constitutional.

B. Arizona's Geography and Variations in Population Density Must Guide the Development of Any Legislative Redistricting Plan.

Arizona's geography and demography create certain challenges to redistricting. Of the 72,688,000 acres in Arizona, over 30 million acres are federal land, totaling approximately 42%.[4] Another 9.2 million acres consist of state trust land.[5] As the court observed during the 1990 decennial redistricting efforts:

> Arizona is unique. Approximately 27 percent of Arizona's land is located on Indian reservations, far and away the highest percentage in the United States. Other large portions of the state are devoted to National Parks and Forests. These factors, in part, account for the fact that Arizona is sparsely populated.
>
> Arizona's urban areas [metropolitan Phoenix and Tucson] contain the overwhelming bulk of the state's population. . . . This is the

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[4] ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, Table 1, at 4 (2012), *available at* https://www.fas.org/sgp/crs/misc/R42346.pdf.

[5] Arizona State Land Department, https://land.az.gov/ (last visited Oct. 24, 2015).

> background against which this court must adopt or draw a plan. . . .

Arizonans for Fair Representation v. Symington, 828 F. Supp. 684, 687 (D. Ariz. 1992), *aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993). Arizona's urban population has only become more pronounced in the past twenty years.[6] The rural areas have remained sparsely populated while the metropolitan areas of Phoenix and Tucson have continued to experience rapid growth, as evidenced by a change from the six Congressional districts after the 1990 census to eight Congressional districts after the 2000 census and to nine Congressional districts after the 2010 census. According to the 2010 census, approximately 5.7 million of Arizona's 6.4 million residents live in urban areas covering only 2,187 square miles. The remainder of the population, roughly ten percent, are spread out across 111,408 square miles.[7] The majority of the population lives in the Phoenix metro area, with nearly 4.2 million residents.[8] Despite increased

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[6] In 1990, Arizona's population was 3.6 million. In 2000, the population increased to 5.1 million. In 2010, Arizona's population increased to 6.4 million. U.S. CENSUS BUREAU, CPH-2-4, ARIZONA: 2010, POPULATION AND HOUSING COUNTS, Table 1 (2012), *available at* https://www.census.gov/prod/cen2010/cph-2-4.pdf.

[7] *Id.* at Table 2.

[8] According to the Census Bureau, the Phoenix metro area includes Maricopa and Pinal Counties. In 2010, the population of the Phoenix metro area was 4,192,887. U.S. CENSUS BUREAU, LARGEST URBANIZED AREAS WITH SELECTED CITIES AND METRO

(Continued on following page)

growth in the metropolitan areas, the number of districts has remained constant at thirty multimember districts electing one senator and two representatives each.

The majority of Arizona's Indian Country lies outside of the urban areas. Five of the ten most populated Indian reservations in the United States are located in Arizona. These include the Navajo Reservation, the largest Indian Reservation in both size and population, the Fort Apache Reservation, the Gila River Indian Reservation, the San Carlos Reservation, and the Tohono O'odham Reservation. Nearly all of the residents of these reservations are Native American.[9]

C. Historically, Arizona Has Failed to Protect Minority Voting Rights when Redistricting.

Since the passage of the Voting Rights Act ("VRA") in 1965 until the *Shelby County v. Holder*, 133 S. Ct. 2612, decision in 2013, Arizona was subject to the preclearance requirement under Section 5.[10]

AREAS (2012), https://www.census.gov/dataviz/visualizations/026/508.php (last visited Oct. 24, 2015).

[9] U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, Table 6 (2012).

[10] Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965).

Every decade prior to 2010, an objection was entered to Arizona's redistricting plan. J.S. App. 24a.

In a 1969 redistricting case, the court noted that Arizona's scheme that based reapportionment on voter registration would result in an underrepresentation of Indians in Apache and Navajo Counties. *Klahr v. Williams*, 303 F. Supp. 224, 227 n.6 (D. Ariz. 1969). Because Indians could not vote in Arizona until the literacy tests were banned by the VRA amendments of 1970, "Arizona [had] a serious problem of deficient voter registration among Indians." *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970).

In the first decennial census following the enactment of the VRA and with the removal of the literacy tests, attempts were made to reduce the ability of Indians to elect candidates of choice by dividing the Navajo Reservation into three separate state legislative districts. *Klahr v. Williams*, 339 F. Supp. 922, 924 (D. Ariz. 1972). The court found that the legislative plan violated the Equal Protection Clause because it was done with the intent of "destroy[ing] the possibility that the Navajos, if kept within a single legislative district, might be successful in electing one or more of their own choices to the Legislature." *Id.* at 926-27.

In 1982, the San Carlos Apache Tribe successfully objected to a proposed redistricting plan that aimed to split and dilute the Apache vote. *Goddard v. Babbitt*, 536 F. Supp. 538, 541 (D. Ariz. 1982). The Department of Justice objected to the plan on the

grounds that the plan had a discriminatory effect. Trial Ex. 527.[11] The court found that the proposed plan had "the effect of diluting the San Carlos Apache Tribal voting strength and dividing the Apache community of interest." *Goddard*, 536 F. Supp. at 541.

After the 1990 decennial census, the Arizona Legislature reached an impasse. A three-judge panel was convened. Indian tribes intervened, and the court adopted the "Indian Compromise Plan" as the State's congressional plan. *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 689 (D. Ariz. 1992), *aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993). In adopting this plan, the Court noted that:

> Although there has been no proof that the Native Americans are entitled to a reapportionment plan designed to maximize their political advantage, they should not be engulfed in a structure that minimizes their potential for meaningful access to the political process. The Indian Intervenors proved that there have been wide-spread practices of discrimination against Native Americans. The court also took judicial notice of that fact. The results achieved through the court's plan will meet the goals of the Indian Intervenors.

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[11] "Trial Ex." refers to those documents admitted during trial. "Trial Tr." refers to the trial transcript.

Id. at 690. While the court drew the congressional map, the U.S. Department of Justice objected to the State's legislative plan because it minimized Hispanic voting strength. In its explanation, the Department of Justice stated that a "submitted plan may not be precleared if its implementation would result in a clear violation of Section 2 of the Act." Trial Ex. 528.

The redistricting plan submitted in 2002 by the Redistricting Commission similarly failed to be precleared initially.[12]

D. The Department of Justice Precleared the Commission's Submission.

This is the backdrop against which the Commission was required to begin drawing the current legislative map – balancing the requirement of one-person one-vote while establishing districts where minorities are able to elect candidates of their choice. Arizona had never before obtained preclearance of its legislative map on its first attempt. J.S. App. at 24a. A principal goal of the Commission was to obtain preclearance on its first attempt, which it succeeded to do. J.S. App. at 23a-24a. The Department of Justice precleared the Commission's Legislative Plan on April 26, 2012. J.S.App. 35a.

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[12] Letter to Lisa Hauser and Jose de Jesus Rivera from Ralph Boyd (May 20, 2002), http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_020520.pdf (focusing on minority voters in five legislative districts).

II. Underpopulated LD 7 Was Not Drawn to Promote an Unconstitutional or Irrational State Policy

To understand that the Legislative Plan was not drawn for an unconstitutional or irrational purpose, one need only look at the most underpopulated district, Legislative District 7 ("LD 7"). Not only was LD 7 configured to ensure that Native Americans could elect a candidate of their choice, the Commission also considered and granted the requests of non-Indians to be in a different district. Further, although LD 7 is one of only two majority party districts in the state,[13] the Appellants' own expert confirmed that there was no partisan motive in the configuration of LD 7.

A. LD 7, The Native American Majority-Minority District, Is Large and Sparse.

Under the 2004 benchmark plan, there is one Native American majority-minority district, Legislative District 2 ("LD 2"). The Commission's goal was to maintain one Native American majority-minority district in the current legislative plan. Nothing in the

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[13] Appellants argument regarding Arizona's voting demographics are misleading. In Arizona, only two of the thirty house districts include a majority registration of either party; both are Democratic – LD 3 and LD 7. S.J.A. at 62. The majority of Arizona voters are Independents. Mary Jo Pitzl, *Independent Voters Biggest Voting Bloc in Arizona*, The Republic, March 24, 2014, http://www.azcentral.com/story/news/politics/2014/03/17/arizona-voter-registration-independents/6526385/.

record supports a contention that LD 7 was drawn for partisan advantage, and the decision below did not enter any such finding.

LD 7 is the only Native American majority-minority district. LD 7, largest in geographical area, smallest in population and the most sparsely populated, is comprised of 66.9% Native Americans and has a Native American voting age population ("Native American VAP") of 63.7%. S.J.A. at 47-48. It encompasses nine Arizona tribes, including the Arizona portion of the Navajo Reservation, the largest Indian Reservation in the United States in both size and population; the San Juan Southern Paiute Tribe located within the Navajo Reservation; and the Hopi, Havasupai, Hualapai, Kaibab-Paiute, San Carlos Apache, White Mountain Apache and Zuni Reservations. Trial Ex. 530 at 47. This is by far the most rural district in the State, with the lowest population density, totaling fewer than ten people per square mile throughout most of the district.[14]

With a total population of 203,026, LD 7 is the most underpopulated district at 4.7% deviation from the ideal population. S.J.A. at 46, 59. The Commission received testimony from tribal leaders, town and city officials, and citizens requesting the ultimate composition of this district. The Navajo Nation and

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[14] ARIZ. DEP'T OF ECON. SEC., LEGISLATIVE DISTRICT DEMOGRAPHICS AND DES CLIENT/PROVIDER SUMMARY HANDBOOK 16 (2014), https://www.azdes.gov/InternetFiles/Pamphlets/pdf/Arizona_Legislative_District_Demographics_Handbook_2014.pdf.

other tribal leaders requested a robust Native American majority-minority district. LD 7 was drawn in order to meet the VRA requirements and to satisfy to the extent practicable the communities of interest of both Native American and non-Native American voters. Trial Ex. 530 at 47 ("The . . . District was adopted to strengthen the ability of Native Americans to elect their candidates of choice.").

B. Appellants Admit that LD 7 was not Underpopulated for a Partisan Purpose.

Appellants' own expert testified that LD 7 was not drawn for partisan advantage. Appellants relied on Dr. Thomas Hofeller to demonstrate that the underpopulation of legislative districts was done with no lawful state interest. Dr. Hofeller, however, admitted in his testimony that the underpopulation of LD 7 was not for a partisan purpose. Hofeller withdrew his opinion that the only logical explanation for the underpopulation of LD 7 was to increase Democratic voting strength. *See* J.S. App. at 228a, 236a; Supp. App. at 9-10; Trial Tr. at 670:18-23.

> QUESTION: You agree that legislative District 7 is a voting rights district under Section 5?
>
> ANSWER: Yes.
>
> QUESTION: You agree that Legislative District 7 has the largest underpopulation in the final map?

ANSWER: Yes, I do.

QUESTION: It's underpopulated by 4.25 percent. Correct?

ANSWER: I'd have to look at my chart, but I'll take your word for it.

QUESTION: All right. And your opinion is the only logical explanation for the underpopulation of Legislative District 7 is to increase Democratic voting strength?

ANSWER: I don't really think so, no.

QUESTION: All right. So with respect to your opinions in this case, you will withdraw any opinion that Legislative District 7 was drawn for partisan reason?

ANSWER: Yes.

Trial Tr. 670:3-22. Appellants' own expert admitted that the underpopulation was not for partisan purposes and proffered no other unlawful purpose for the underpopulation.

C. Underpopulating a District Is One Means to Address Multimember Districts.

The flexibility of the ten percent deviation accommodates Arizona's multimember legislative districts. Judge Wake highlighted the characteristics of a political system based on one-person, one-vote.

> The scrupulousness with which a political system adheres to the doctrine of one-person, one-vote is related to the importance it assigns to political equality. . . . Since the United States is strongly committed to the norm of individual political equality, it is not surprising that it has developed the strictest population deviation standards of any democracy *using single member constituencies*.

Trial Tr. 1021:9-22 (emphasis added). Congressional districts are single member districts, Arizona legislative districts are multimember districts.

In *Thornburg v. Gingles*, this Court stated that "[b]oth this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." 478 U.S. 30, 69 (1986). Indian voters continue to suffer from some of the highest poverty rates and unemployment rates in the country. Reservation Native Americans, including those in LD 7, are impacted by these effects. LD 7 has the highest unemployment rate in the state and ranks lowest in English proficiency.[15] Poverty rates are above 42%.[16]

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[15] ARIZ. DEP'T OF ECON. SEC., LEGISLATIVE DISTRICT DEMOGRAPHICS AND DES CLIENT/PROVIDER SUMMARY HANDBOOK 17 (2014).

[16] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H.*

(Continued on following page)

Polling locations and voter registration sites on reservations are often located at substantially greater distances from voters, than sites located off reservation, resulting in greater costs to voters.[17] Registering to vote is also an obstacle as a majority of counties bordering reservations limit registration locations to off-reservation towns.[18]

The results of the multimember district and depressed political participation are evident from the past decade of elections. While one of the Native Americans' candidates of choice won one of two State Representative seats in benchmark LD 2 (2004 & 2006 – Albert Tom, 2008 – Christopher Clark Deschene, 2010 – Albert Hale), the second seat was won by a non-Hispanic White (2004 & 2006 – Ann Kirkpatrick, 2008 & 2010 – Tom Chabin). Trial Ex. 434 at 1. Sylvia Laughter, an Independent and the Native American candidate of choice receiving the highest number of votes from reservation voters, was not elected in the 2004 election. In comparison, in the 2012 and 2014 elections with an enhanced Native American VAP, both representatives elected from LD 7 were Native American and the preferred candidates of choice for Native American voters: 2012 – Albert

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Comm. on the Judiciary, 109th Cong. 1380, 1383 (2006) (appendix to the statement of Wade Henderson).

[17] *Id.* at 1411-12.

[18] *Id.*

Hale and Jamescita Peshlakai, 2014 – Albert Hale and Jennifer Benally.[19]

D. Underpopulating a District May Address Issues of Undercounting by the Census.

Census data alone is not sufficient to determine if a redistricting plan satisfies the VRA. U.S. Dep't of Justice, *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011). "Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change." *Id.*; Trial Tr. 931:24-932:3. During the trial below, the Commission's expert testified that within minority communities, you have to look at voter turnout, not just population statistics. Trial Tr. 932:6-15. He further testified that there can be lots of problems with the census data. *Id.* at 937-938. The census data "went through three or four decades of controversy about undercount." *Id.* at 938:1-2.

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[19] *See* Arizona State Legislature House Roster, http://www.azleg.gov/MemberRoster.asp?Body=H (last visited Oct. 25, 2015); Arizona State Legislature Member Page Jamescita Peshlakai, http://www.azleg.gov/MembersPage.asp?Member_ID=78&Legislature=51&Session_ID=112 (last visited Oct. 25, 2015).

Native Americans have historically been undercounted in the United States Census.[20] By its own admission, the 2010 decennial census undercounted Native Americans living on reservations at a rate of 4.9%. This is higher than any other group.[21] The Congressional Research Service has reported that while the 2010 census had a 0.01% overcount of the total population, the count for American Indians on reservations was a 4.9% undercount. The population count on the Navajo Reservation has declined in the 2010 census by 7,000 persons from the previous census.[22]

Because of the general inaccuracies in the total Arizona population count as compared to the inaccuracies in the undercount of reservation residents, the actual population of LD 7 may be much closer to the

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[20] *See* Carol Lujan, As Simple as One, Two, Three: Census Underenumeration among the American Indians and Alaska Natives (1990), *available at* http://www.census.gov/srd/papers/pdf/ev90-19.pdf.

[21] U.S. CENSUS BUREAU, *Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census* (May 22, 2012), http://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html (last visited Oct. 25, 2015).

[22] According to the Census Bureau, the population of the Navajo Reservation decreased from 180,000 in 2000 to 173,000 in 2010. U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, Table 6 (2012); Trib Choudhary, Navajo Nation Data from U.S. Census 2000, Table 1, *available at* http://www.navajobusiness.com/pdf/NNCensus/Census2000.pdf.

ideal population for the district than reported by census numbers.[23]

The failures of the census-taking process can be accommodated through the ten percent flexibility for legislative redistricting. In *White v. Regester*, the Supreme Court noted that "we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger [overpopulated] districts so as to deprive individuals in those districts of fair and effective representation." 412 U.S. 755, 763-64 (1973). If the overpopulated district is slightly overcounted while the population in LD 7 is substantially undercounted, then the actual census in the under and overpopulated districts may be much closer than would otherwise appear.

E. The Commission Supported the Desires of Native Americans to Create an Effective Majority-Minority District.

Benchmark district LD 2 was the sole Native American majority-minority district in the 2004 plan. This Commission received much information regarding the need to maintain and enhance a Native American majority-minority district in the 2012 Legislative Plan.

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[23] *See* JENNIFER D. WILLIAMS, CONG. RESEARCH SERV., R40551, THE 2010 DECENNIAL CENSUS: BACKGROUND AND ISSUES 13 (2011).

The Navajo Nation Council adopted a resolution on August 1, 2011 proposing a legislative district with a Native American population of 66.5%. Trial Ex. 422 at 100-108. The Council's stated objectives were to "resist retrogression" and "ensure that Navajo voting rights are protected and preserved." *Id.* at 103. The Navajo Nation Council designated the Navajo Nation Human Rights Commission to take the lead in the redistricting efforts and Leonard Gorman, Director of the Human Rights Commission, became the primary representative of the Navajo Nation and its members at the Commission meetings. *Id.* at 102. Mr. Gorman participated regularly in Commission hearings to encourage the Commissioners to maintain or enhance the Native American VAP and to encourage the inclusion of other Indian nations into a single Native American majority-minority district. The Human Rights Commission published a flyer explaining (i) the redistricting process to Navajo voters and (ii) that it was recommending to the Commission a district that would "improve the voting power of indigenous people in Arizona." Trial Ex. 428 at 10-12. The efforts of the Human Rights Commission were supported by the Navajo Nation Office of the President and Vice President. *Id.* at 7-9.

Public testimony and the advice of Bruce Adelson, the Commission's legal counsel on preclearance, articulated the need to retain and enhance the Native American VAP for LD 7. Mr. Adelson testified at his deposition that the percentage increase in Native American population enhanced the Native

Americans' ability to elect candidates of their choice. Adelson noted that:

> [h]aving worked on the Navajo reservation when I was with the Department [of Justice], I was aware of several situations that led to disenfranchisement, particularly elder Navajo voters who voted in locations for their own Navajo Nation elections that were different than federal election polling places. I had seen that there were potentially thousands of voters back during my career who were not able to vote on the reservation because of these different locations.
>
> . . .
>
> And I think maybe that also goes to removing the part of the district from – that was in Mohave Country, because that portion of the district was not a community of interest with the Navajo Nation and did not support their candidates of choice.
>
> . . .
>
> As I've explained, given all the factors that are prevalent in Arizona, given population loss on the Navajo reservation, given comments from the Navajo Nation to the Redistricting Commission about their preferences and recommendations for redistricting, taking all those and all the factors we've talked about today into account, I believe that it was prudent to make the decision that was made.

Adelson Dep. 213:14-22, 214:5-9, 221:8-15, March 14, 2013.[24]

Navajo citizens also provided written and oral testimony to the Commission to support an increase in the Native American VAP to better ensure that Native Americans can elect candidates of their choice. Navajo Nation Council Delegates appeared and testified in support of a strong Native American voting rights district. Trial Ex. 357 at 88-90, 110-113. Mr. Kimmeth Yazzie, Navajo Nation Elections Office, explained the unique issues facing Navajo voters including the lack of government issued identification and the difficulties involved in obtaining voter identification, obstacles to voting by mail, the need for language assistance, and the confusing nature of voting locations for tribal and state and federal elections. Trial Ex. 428 at 4-6. Mr. Christopher Clark Deschene, a member of the Navajo Nation and a former legislator from benchmark LD 2, explained why Native American Voting Age Population is not a sufficient measure of the ability to elect candidates of Native Americans' choice. He listed 7 criteria: (i) young Navajo voters, registered to vote at their permanent home on the Reservation, but living and working away from their permanent home, may not be able to return to vote; (ii) the tribal primary voting date occurs a few weeks before the state and federal

[24] The parties stipulated to the use of Bruce Adelson's deposition transcript instead of providing live testimony to the trial court. *See* Trial Tr. at 692:2-5.

primary dates and tribal citizens may not have the transportation to travel twice in one month; (iii) on the general election day when the tribal and state and federal elections all take place, the polling places may be miles apart, making it difficult to vote in both places; (iv) some tribal members don't have the necessary government issued identification; (v) voter information in the Navajo language is limited; (vi) if the weather is bad on election day, voter turnout will be low as many Reservation roads are unimproved and not traversable; and (vii) the high rate of unemployment and poor economic and living conditions result in lower turnout at the polls. *Id.* at 1-2.

The San Carlos and White Mountain Apache Tribes which had not been located in a Native American majority-minority district in the previous decade applauded the Commission for its draft legislative map that placed the Apache members with the Navajos in a Native American majority-minority district. *Id.* at 3, 15-17, 19. San Carlos Apache Tribal Vice Chair John Bush explained that while each tribe is a "separate sovereign," there are common interests which can best be expressed through the power of the vote. He urged the Commission to retain a legislative district that included the Apache with the Navajo Nation. Trial Ex. 376 at 10-11. Tribal members spoke up in support of the draft legislative plan, explaining that there would be a stronger native voice and the power to unite on issues that tribes commonly confront. Trial Ex. 376 at 42:11-43:9. If there were Native American candidates who understood the meaning of

the sacred sites and our culture then the voters would know them and the voters would feel "more a part of the United States." *Id.* at 45-50.

F. The Commission Was Vigilant in its Efforts to Comply with the Voting Rights Act and Obtain Preclearance.

The VRA seeks to ensure that protected minorities, including Native Americans, have an opportunity to elect candidates of their choice. Because of Arizona's long history of discrimination against Native American voters, Arizona was subject to the Section 5 preclearance requirements. 52 U.S.C. § 10304. The Commission's desire to comply fully with the Voting Rights Act is a rational state purpose and initial preclearance is a rational goal. J.S. App. 6a.

Under Section 5, a redistricting plan will be evaluated as to whether it has the purpose or the effect of denying or abridging the right to vote on account of race or color. Retrogression looks at whether a minority group has been made worse off by the proposed change. To determine if retrogression exists, it is necessary to compare the proposed plan against the benchmark. A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" when compared to the benchmark plan. *Beer v. United States*, 425 U.S. 130, 141 (1976). For legislative redistricting purposes, the benchmark is

the 2004 legislative plan using the 2010 census data. Under this benchmark, there is one Native American majority-minority district. Therefore, there would be retrogression if the Commission failed to draw at least one effective Native American majority-minority legislative district.

Although retrogression is evaluated at the pre-clearance stage, the Commission is also required to comply with Section 2 of the VRA. *Thornburg v. Gingles*, 478 U.S. 30 (1986); 52 U.S.C. §§ 10301-10314. Preclearance of a legislative plan does not preclude a subsequent Section 2 challenge. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 485 (1997). A number of precleared plans have been found to violate Section 2. *See, e.g.*, *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983); *Buskey v. Oliver*, 565 F. Supp. 1473 (M.D. Ala. 1983). A state violates Section 2 "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10303.

The Commission's voting rights consultant, Mr. Adelson, regularly advised the Commission. On December 16, 2011 he noted "as we come closer to the finish line, the measurement against the benchmark becomes even more inexorable and mandatory." Trial Ex. 404 at 68:8-10. He reminded the Commission that

"[t]he final word is with the Department of Justice." *Id.* at 70:12.

G. Each Commissioner Had the Right to Find a Balance between the Neutral Redistricting Goals Set Forth in the Arizona Constitution.

While compliance with the United States Constitution and the VRA were factors considered by the Commission, they were not the only factors. The Commission considered four other criteria, known as the neutral redistricting criteria as set forth in the Arizona Constitution.

Redistricting is, by its nature, a political process, even when the redistricting is done by a court or by an independent commission, because the resultant maps may determine whether districts will be represented by a Democrat, Republican, or a third party. "In reaching their decisions, the commissioners perform legislative tasks of the sort we make every effort not to pre-empt." *Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n*, 208 P.3d 676, 685 (Ariz. 2009); *see also Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). The Arizona Supreme Court recognizes that the Commission has discretion to determine how it will accommodate the state constitutional goals.

> [T]he constitutional requirement that the Commission accommodate specified goals "to the extent practicable" recognizes that

> accommodating the various goals requires the Commission to balance competing concerns. . . . The Commission's need to balance competing interests typifies the political process, in which each commissioner may well define differently the "best" balance of these goals. Deciding the extent to which various accommodations are "practicable" also requires the commissioners to make judgments that the voters have assigned to the Commission, not to the courts.

Id. at 686. None of the goals are primary or subordinate, but all must be considered and weighed by the Commissioners. *Id.* at 687 n.10.

Consideration of the four neutral criteria require "four potentially conflicting goals be balanced against each other 'to the extent practicable.'" *Id.* at 689 (Hurwitz, A., concurring). In transferring responsibility from the Legislature to an independent commission, the Arizona voters left those value judgment decisions to the Commission. *Id.* at 690.

The Commission has flexibility in applying the neutral redistricting criteria. *Id.* at 689. The question for a court reviewing a final adopted plan is whether the Commission considered these neutral criteria and applied it to the extent practicable. The court will uphold the decision of the Commission in applying the neutral redistricting criteria so long as the Commission has a reasonable, although debatable basis. *See id.* (citing *State v. Murphy*, 570 P.2d 1070, 1074 (Ariz. 1977)).

H. Indian Tribes Comprise a Community of Interest.

The Commission received substantial information throughout the public meetings regarding the desire for Native Americans to be part of the Native American majority-minority district. Steve Titla, an attorney for the San Carlos Apache Tribe, advised that the Navajo Nation and the Apaches shared a community of interest because of their common interest in terms of religion, geography, tradition and history. Trial Ex. 338 at 114-15. Leonard Gorman, on behalf of the Navajo Nation, presented its legislative proposal that included a portion of Flagstaff as well as Hopi leased lands. Trial Ex. 422 at 100-08. Hopi Chairman Leroy Shingitewa stated that he wanted to join the Navajo Nation and the Apaches in a district that would also include the sacred San Francisco Peaks. Trial Ex. 349 at 69-71. Hualapai Chairperson Louise Benson supported the Navajo Nation's proposal. *Id.* at 80. Jonathan Nez, Navajo Nation Council Delegate, articulated several of the factors that connect tribes into a community of interest including water rights and issues related to drug trafficking. Trial Ex. 357 at 88-90. Bruce Adelson impressed on the Commissioners the importance that the tribes within LD 7 supported its configuration. Trial Ex. 404 at 69.

Although the Apaches share a community of interest with the Navajo including language, cultural and religious beliefs, there was opposition to placing the Apaches in a Native American district from some

of their non-Indian neighbors. Commissioner Freeman testified that there were non-Indians in the White Mountain area who "did not want to be in the Native American voting rights district." Trial Tr. 901:14-23.

I. Commissioners Accommodated Requests by non-Indians to Be Removed from LD 7, Resulting in Increased Underpopulation.

The changes in LD 7 from the draft map to the final map were not for partisan advantage. LD 7 lost population to other districts in response to requests from non-Indian communities of interest to be removed from the district.

The urban City of Flagstaff was excluded in the draft plan from LD 7 but certain areas north of Flagstaff were included in draft LD 7. The City of Flagstaff submitted a "Value Statement" to the Commission that articulated reasons (i) for being in a competitive district, (ii) for including both the City of Flagstaff and the unincorporated environs in a single district, and (iii) to be in a district different than the Navajo Nation, one in which Flagstaff shares a community of interest that has the same values as Flagstaff. In summary, it requested that the Commission not locate Flagstaff in the Native American majority-minority district. Trial Ex. 422 at 65.

In addition, members of the Flagstaff community urged the Commission to remove the Timberline and Fernwood portions of the Schultz Flood Area from LD

7 and include the Timberline and Fernwood communities with Doney Park in LD 6. Trial Ex. 366 at 23-24 (comments in support of this change by Coconino County); *Id.* at 27-30 (comments in support of this change by Flagstaff City Council); Trial Ex. 422 at 65 (respects the VRA and does not want retrogression of the native populations of northern Arizona but desires to be in a competitive district). This included requests from local governments, professors, and also residents of the Schultz Flood area. *Id.* at 71-72. Commissioner Freeman acknowledged that there were people from the Flagstaff area who did not want to be in the same district with "the Navajo district." Trial Tr. 896:12-20. During trial, Commissioner Stertz also confirmed that the reason for moving population out of LD 7 *was not for partisan reasons*.

> Q. Do you recall what the Schultz Flood Area was?
>
> A. I do.
>
> Q. What was the Schultz Flood Area?
>
> A. There was a flood in 2008 that had affected land. There was a desire by representatives from the Flagstaff 40 as well as the city representatives of Flagstaff to try to keep the Schultz Flood Area within the city of Flagstaff in that district.
>
> Q. And Judge Clifton can't see this, but the other judges will know that Flagstaff is up here in District 6, correct, near the Schultz Flood Area?

A. That's correct.

Q. And the community in the Schultz Flood Area didn't want to be in District 7, correct?

A. There was the desire to not be in District 7.

Q. District 7 was the Native American district, correct?

A. Correct.

Q. And they wanted – they thought their interests were more in line in Flagstaff and wanted to be put in Legislative District 6. True?

A. That's the testimony that they gave, yes.

Q. And the Commission accommodated that. True?

A. True.

Q. And the result of that, though, is it was moving population from Legislative District 7 into Legislative District 6, right?

A. True.

Trial Tr. 248:20-249:20; Supp. App. at 4-5. These individuals preferred to be in LD 6 with the City of Flagstaff. That change alone moved 2,500 people out of LD 7 into LD 6. Trial Tr. 249:21-25.

Draft Map LD 7 extended from the eastern boundary of the State to the western boundary of the

state. On December 8, 2011, Stertz supported the Commission's removal of Mohave County from LD 7 in order to keep the non-reservation portions of Mohave County whole, a reduction of approximately 1500 people from LD 7, increasing the percentage of the Native American population in LD 7. Trial Tr. 252:12-253:13.

On December 12, 2011, changes were made to draft LD 7 to remove Greenlee County. Mr. Desmond explained to Commissioner Stertz that it was "intended to improve its overall voting age Native American percentage" and to "remove non-minority population." Ex. 402 at 147:10-16.

J. Commissioners Had Differing Concepts for LD 7.

Commissioners had to make value judgments, knowing that some people would not be satisfied with the results. These value judgments were reflective of requests made by constituents.

Late in the redistricting process when the Commission was attempting to finalize the legislative plan, Commissioners spoke about their goal for LD 7 Democratic Commissioner Herrera recognized the difficulty for tribes to "get on the same page with other tribes" and explained that he didn't want to make any changes except those necessary as a result of the historic voting analysis. Trial Ex. 404 at 72:22-73. In contrast, Republican Commissioner Freeman asked Mr. Desmond to modify LD 7 to "demonstrate

that a higher Native VAP can be achieved" while keeping much of eastern Arizona whole. Trial Ex. 584 at 1. The plan would have required portions of Flagstaff to be included in LD 7 as well as the communities of Doney Park and Fort Valley. *Id.*

Commissioners from both parties considered options to depopulate LD 7 to enhance the performance of the Native American majority-minority district. Commissioner Freeman proposed a conceptual idea to remove the eastern Arizona portion, non-Hispanic White communities from LD 7 through a narrow corridor from the Apache tribes to the Navajo Nation. The proposal was described as "the Apache cloud." The Native American VAP would have been increased to 65.33% and the population would have been within 5% of the ideal population. Trial Tr. 908:23-912:22. Commissioner Freeman's conceptual proposal addressed the preferences of the non-Reservation portion of eastern Arizona:

> An eastern Arizona district could be constructed to effectively "ring" the Apache Cloud. This district would keep most of the eastern Arizona communities whole, as requested, and could keep the non-reservation portions of Gila, Graham, and all of Greenlee Counties together, again, as requested.

Trial Ex. 584. The proposed concept was neither refined, nor adopted. However, it is clear that these conversations were not partisan driven, but driven by the desire of non-Indians to be excluded from the Native American majority-minority district.

III. This Court's Ruling in *Shelby County v. Holder* Does Not Necessitate a Different Result.

Shelby County v. Holder, 133 S. Ct. 2612 (2013) does not affect the issues presented by the Appellants in this case. Appellants claim that the Legislative Plan violates the one-person one-vote principle set forth in the Fourteenth Amendment. Appellants did not bring a claim under the VRA. They did not bring a declaratory action claiming that either Section 5 or Section 4 is unconstitutional; therefore, *Shelby County* has no impact on this Court's review.

The issue in this case is whether the Legislative Plan is constitutional. *Shelby County* does not impact this Court's analysis in that regard. The IRC was required to comply with the Fifteenth Amendment, which the preclearance mechanism of Section 5 seeks to enforce. The facts demonstrate that the Commission considered numerous factors under state and federal law. Nothing in *Shelby County* bolsters Appellants' claims or impacts this Court's ability to review the federal constitutional question under the Fourteenth Amendment. The Legislative Plan is presumptively valid, and the district court found that neutral reasons existed for the minor population deviations. Because the lower court found that the Legislative Plan was constitutional, this Court should affirm.

A. The Rule of Law Announced in *Shelby County* Is Not at Issue Here.

In *Shelby County*, the Plaintiff filed suit in the District of Columbia seeking declaratory relief that Section 4(b) and Section 5 are unconstitutional and sought to enjoin the enforcement of these sections of the VRA. The Court did not invalidate Section 5. 133 S. Ct. 2612, 2631. In finding the Section 4(b) coverage formula unconstitutional, the Court stated that "[t]he formula in that section *can no longer be used* as a basis for subjecting jurisdictions to preclearance." *Id.* (emphasis added).

The ruling, however does not invoke retroactivity. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97-98 (1993). According to *Shelby County*, jurisdictions listed under the 2006 Section 4(b) coverage formula are no longer subject to Section 5's preclearance obligation.

Here, however, Appellants seek neither a declaration that Section 4(b) is invalid, nor an injunction against application of Section 4(b). Rather, they seek a declaration that the legislative map violates the one-person, one-vote requirement of the Fourteenth Amendment and seek to enjoin use of the map. Jt. App. 116a-177a. *Shelby County* did not hold that preclearance renders the redistricting process *per se* unconstitutional. The mere fact that a map was precleared and that the Commission strived to create districts that comply with the Fifteenth Amendment does not render the map invalid.

B. Preclearance Decisions Cannot Be Challenged.

As this Court noted over fifty years ago, the preclearance process "merely gives the covered State a rapid method of rendering a new state election law enforceable." *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969). Moreover, even in the absence of a coverage formula under Section 4(b), jurisdictions may be ordered to undergo preclearance under Section 3 of the VRA. 52 U.S.C. § 10302; *see Jeffers v. Clinton*, 740 F. Supp. 585, 587 (E.D. Ark. 1990) (as remedy for violations of VRA, jurisdictions may be ordered to undergo preclearance under Section 3). Appellants cannot challenge the Department of Justice's decision to preclear the Legislative Plan. *Morris v. Gressette*, 432 U.S. 491 (1977) (decision not to object to a submitted change cannot be challenged in court). Once a jurisdiction complies with its preclearance obligation, "private parties may enjoin the enforcement of [a] new enactment only in traditional suits attacking its constitutionality." *Allen v. State Bd. of Elections*, 393 U.S. 544, 549-50 (1969).

Shelby County involved a direct attack on the constitutionality of the statute against the Attorney General; the county there sought a declaration that it was not required to undergo preclearance. In pending suits where jurisdictions seek declarations that they are not required to undergo preclearance, *Shelby County* controls. In contrast, here, where the preclearance process has been completed, the holding of *Shelby County* is inapplicable. Appellants would have

needed to challenge the constitutionality of Section 5 for retroactivity to apply, and they failed to do so.

C. Section 5 Is an Enforcement Mechanism of the Fifteenth Amendment.

Section 5 of the VRA seeks to enforce Section 1 of the Fifteenth Amendment which provides that voters shall not be denied the right to vote on the basis of race, color, or previous condition of servitude. U.S. Const., amend. XV, § 1; Voting Rights Act of 1965, 52 U.S.C. §§ 10301-10314. A covered jurisdiction must demonstrate that a proposed voting change does not have the purpose and will not have the effect of discriminating based on race or color. Even if a jurisdiction is not required to comply with Section 5, the jurisdiction must still comply with the Fifteenth Amendment. Thus, the Commission must still ensure that a redistricting plan does not discriminate against minority voters when drawing redistricting plans.

D. Section 5 Was One of Many Factors Considered During the Redistricting Process.

Notwithstanding Section 5, the Commission was still required to comply with Section 2 of the VRA and the state constitutional criteria. *Thornburg v. Gingles*, 478 U.S. 30 (1986); 52 U.S.C. §§ 10301-10314. The VRA seeks to ensure that protected minorities, including Native Americans, have an opportunity to

elect candidates of their choice. Preclearance of a legislative plan does not preclude a subsequent Section 2 challenge. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 485 (1997).

Notwithstanding the decision in *Shelby County*, the Commission must still comply with creating ability-to-elect districts.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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